

hunter communications law group

April 7, 1999

Magalie Roman Salas, Secretary
Federal Communications Commission
445 - 12th Street, S.W.
TW-A325
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Ex Parte Presentation in CC Docket No. 96-98

Dear Ms. Salas:

Today the undersigned, accompanied by David Gusky, Executive Vice President of the Telecommunications Resellers Association ("TRA"), met with Thomas Power, Legal Advisor to the Chairman William E. Kennard. Discussed at that meeting were issues of concern to the membership of TRA with respect to the Commission's reassessment of the "necessary" and "impair" standards in light of the U.S. Supreme Court decision in AT&T Corp., et al. v. Iowa Utilities Board. The positions articulated by TRA at the meeting are set forth in the materials attached hereto, which were distributed at the meeting by TRA.

Respectfully submitted,



Charles C. Hunter
General Counsel to the
Telecommunications Resellers Association

Enclosure

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List A B C D E

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Unbundled Network Elements

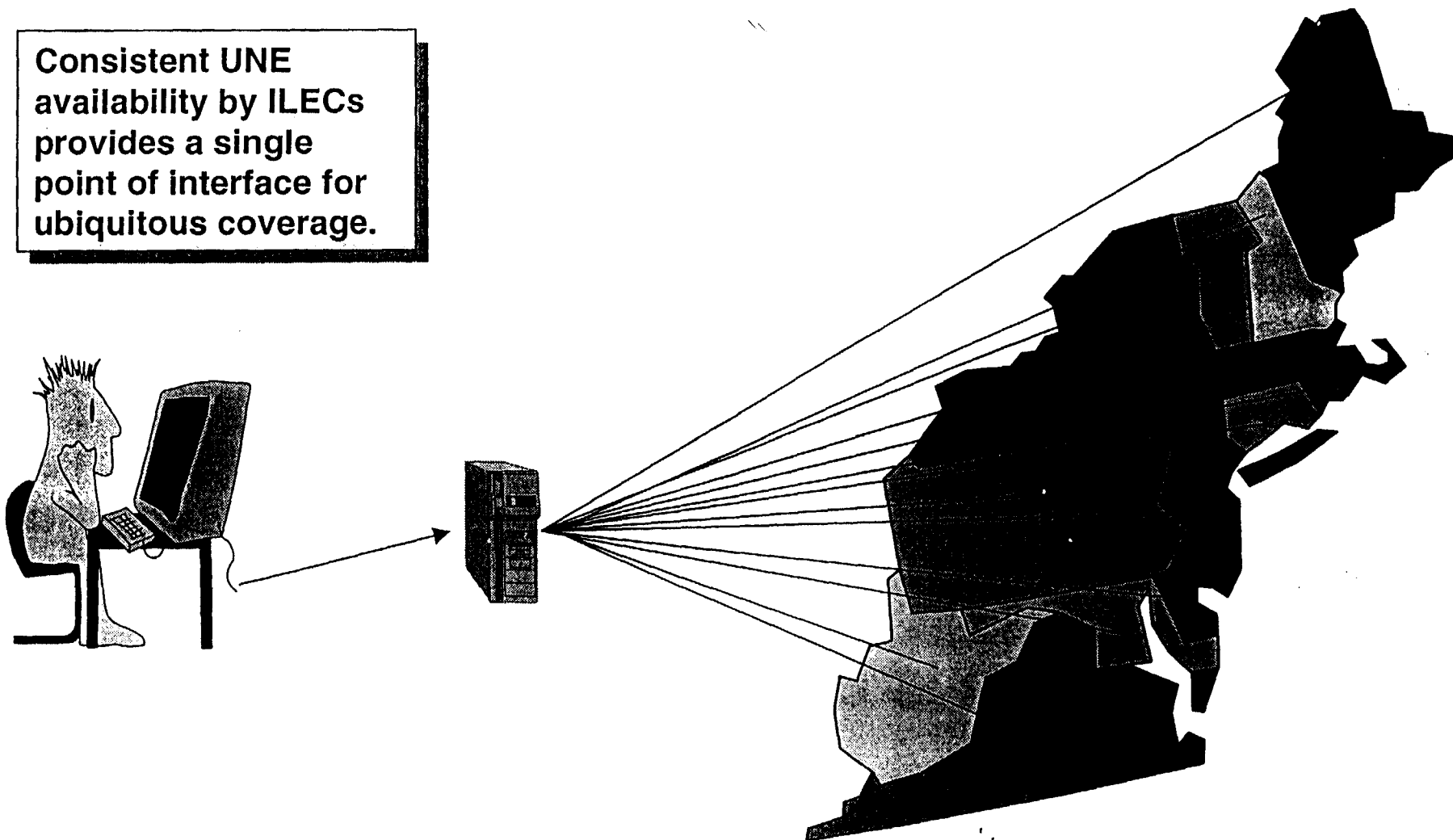
Lack of Consistency Will Lead To
Unnecessary Complexity



Telecommunications Resellers Association

April 7, 1999

**Consistent UNE
availability by ILECs
provides a single
point of interface for
ubiquitous coverage.**



Bell Atlantic Region CLECs

Company	# of BTAs
Hyperion	24
ART	19
MCIWorldcom	15
AT&T	12
USN	9
NextLink	7
Winstar	7
Allegiance	5
ACSI	4
Focal	4
Covad	3
MFN	3
RCN	3
Time Warner	3
MediaOne	2
Vitts	2
Cablevision Lightpath	1
Cox Fibernet	1
Northpoint	1
Teligent	1
Total	126
Telecommunications Resellers Association	

- 20 CLECs have operational or planned facilities in 35 BTA's within Bell Atlantic territory.

*Source: Telephony Scorekeeper: United States
The Strategis Group, 1998*

Required Interfaces

- Relationship/interface with 6 CLECs would be required to cover all 35 BTAs supported by facility based competitors.

Company/BTA	7	10	12	29	43	46	51	60	63	75	131	179	181	184	240	318	321	324	330	346	350	364	370	374	379	412	427	438	459	461	480	483	Total	
Hyperion	1	1	1	1	1			1	1	1	1	1	1	1	1		1	1		1	1	1		1	1	1	1	1	1	1	1	1	24	
ART	1	1		1			1	1					1	1			1	1		1	1		1	1	1	1	1	1	1	1			19	
	1			1			1	1						1		1				1	1	1	1	1	1	1		1		1			15	
	1			1			1	1						1			1		1	1	1		1		1	1			1		1		12	
USN	1					1	1								1		1					1					1	1			1		9	
NextLink		1										1		1						1				1			1				1		7	
Winstar				1			1										1			1	1		1							1			7	
Allegiance				1			1										1			1										1			5	
AGS				1		1											1													1			4	
Focal						1											1			1										1			4	
Covad					1	1											1																3	
MFN																	1			1										1			3	
RCN						1											1													1			3	
Time Warner	1			1													1																3	
MediaOne						1																		1									2	
Vlts						1									1																		2	
Cablevision Lightpath																	1																1	
Cox Fibernet																		1															1	
Northpoint						1																											1	
Teligent																														1			1	
	6	3	1	7	2	2	12	5	1	1	1	1	3	3	2	3	1	14	3	1	1	9	5	1	5	2	4	2	3	3	4	1	1	126

Source: Telephony Scorekeeper: United States
The Strategis Group, 1998

**Inconsistent UNE
availability by ILECs
leads to multiple
points of interface
for complex web of
coverage.**



Affected Areas of Operation

- Pre-order activity
 - CSR Validation
 - Network Configuration
- Ordering
- Provisioning
- Account Maintenance
 - Moves, Adds & Changes
- Repair & Maintenance
- Billing

Impact on Competitors

- Increased Cost
 - Higher deployment costs
 - Lower economies of scale
- Reduced potential to serve an equally broad base of customers.
- Unnecessary complexity in delivering services to market
- Extended provisioning intervals
- Impaired support capability
 - Delayed Repair & Maintenance



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THE "NECESSARY" AND "IMPAIR" STANDARDS

PREDICATES

- The Supreme Court faulted the Commission *only* for not "adequately consider[ing]," and for failing to "giv[e] some substance to the 'necessary' and 'impair' requirements'." This was the *sole error* identified by the Court.
- Given the Supreme Court's narrow ruling, the Commission has wide latitude in addressing the Court's limited concerns:
 - The Commission's initial implementation of Section 251(d)(2) pushed hard the outer edge of the envelope – *i.e.*, limiting the inquiry under the "necessary" standard to the incumbent's own network and assuming that *any* increase in cost (or decrease in quality) was enough to "impair" a competitor's ability to provide local service.
 - The Supreme Court required merely that the Commission apply "*some* limiting standard, rationally related to the goals of the Act" in implementing the "necessary" and "impair" standards.
- The Supreme Court's affirmation of the Commission's general jurisdiction to implement the Telecommunications Act and the Court's sanctioning of the Commission's use of that jurisdictional authority in defining network elements enhances the Commission's decisional flexibility in complying with the Court's directive to develop meaningful "necessary" and "impair" standards.
 - "The FCC has general jurisdiction to implement the 1996 Act's local competition provisions. . . . § 201(b) *explicitly* gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies. . . . the Commission has jurisdiction to design a pricing methodology . . . we reverse the Court of Appeals' determinations that the Commission had no jurisdiction to promulgate rules regarding state review of pre-existing interconnection agreements between incumbent LECs and other carriers, regarding rural exemptions, and regarding dialing parity."
 - "We agree with the Eighth Circuit that the Commission's application of the 'network element' definition is eminently reasonable."

- "The reality is that § 251(c)(3) is ambiguous whether leased network elements may or must be separated, and the rule the Commission has prescribed is entirely rational, finding its basis in § 251(c)(3)'s nondiscrimination requirement. . . . It is well within the bounds of the reasonable for the Commission to opt in favor of ensuring against an anticompetitive practice."
- "The FCC's 'pick and choose' rule . . . tracks the pertinent statutory language almost exactly. . . . The FCC's interpretation is not only reasonable, it is the most readily apparent."

AT&T, et al. v. Iowa Utilities Board.

- The Commission should be guided by the pro-competitive goals of the telephony portions of the Telecommunications Act, as well as the specific vehicles identified by Congress to achieve these ends.
- "The Act contemplates three paths of entry into the local market – the construction of new networks, the use of unbundled elements of the incumbent's network and resale. . . . Section 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy. . . . Our obligation in this proceeding is to establish rules that will ensure that all pro-competitive entry strategies may be explored."
- "We conclude, therefore, that Congress did not intend section 251(c)(3) to be read to contain any requirement that carriers must own or control some of their own local facilities before they can purchase and use unbundled elements to provide a telecommunications service."

Local Competition Order at ¶¶ 12, 328.

- We agree with the Court of Appeals that the Commission's refusal to impose a facilities-ownership requirement was proper."

AT&T, et al. v. Iowa Utilities Board.

- The Section 271(c)(2)(B) "competitive checklist" supports maintenance of the current list of unbundled network elements.
- "Access or interconnection provided or generally offered by a Bell operating company . . . [shall] include[] . . .

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services."

47 U.S.C. § 271(c)(2)(B).

NECESSARY ACTIONS

- **Preserve (and expand as necessary) the existing federal minimum set of seven unbundled network elements ("UNEs"):**

"We find no basis for permitting an incumbent LEC in some states not to make available these minimum technically feasible network elements that are provided by incumbent LECs in other states."

Local Competition Order at ¶ 54.

- Availability of essential facilities outside incumbent LEC networks is limited and geographically concentrated -- e.g., less than 500 competitive LEC switches compared to more than 23,000 incumbent LEC switches; less than 2 million competitive LEC fiber miles compared to more than 14 million incumbent LEC fiber miles.
- Competitive LECs are neither required by law nor driven by market forces to make network elements available to other providers.
- The cost of facilities installation is prohibitive for most small carriers; small carriers install switching facilities in selected markets once customer bases and associated revenue flows reach a level sufficient to justify the expenditure.
- **Retain full federal authority over any exceptions granted to, and any reduction of, federal minimums; individual states should be permitted to expand, but not reduce, the original set of seven UNEs:**

"If fifty states were to establish different unbundling requirements, new entrants, including small entities, could be denied the benefits of scale economies in obtaining access to unbundled elements."

Local Competition Order at ¶ 224.

- **Require incumbents to carry the burden of demonstrating satisfaction of "necessary" and "impair" standards before the availability of any given UNE is limited:**

"We find that incumbent LECs have no economic incentive, independent of the incentives set forth in sections 271 and 274 of the 1996 Act, to provide potential competitors with opportunities to . . . make use of the incumbent LEC's network and services."

Local Competition Order at ¶ 57.

- **Retain existing interpretation of "proprietary" – i.e., "elements with proprietary protocols or elements containing proprietary information" – but do not include within the bounds of that definition data or information derived by the incumbent LEC from its status as a franchised monopoly provider of local exchange service.**

- The Commission identified no proprietary concerns relating to the large majority of the network elements, including loops, network interface devices, tandem switching, transport, signaling protocols for SS7 networks, call-related databases, operator services and directory assistance.

Local Competition Order at ¶¶ 388, 393, 425, 446, 481, 490, 539.

- With respect to local switching, the Commission noted that "the vast majority of parties that discuss[ed] unbundled local switching . . . [did] not raise proprietary concerns with the unbundling of either basic local switching or vertical switching features."

Local Competition Order at ¶ 420.

- **Adopt "necessary" and "impair" standards firmly grounded in competitive reality.**
 - Look outside the incumbent's network, but this should only be the beginning of the Commission's assessment of whether access to a given network element is necessary and whether the unavailability of that element from an incumbent LEC would impair the ability of new market entrants to compete. In looking outside the incumbent's network, the unique attributes of incumbent LEC network elements, including their integration into the incumbent LEC's network should be weighed heavily.

- Require demonstrations of realistic, practical availability of alternatives; the mere theoretical availability of an alternative should not be credited. Market forces sufficient to drive the availability of alternative sources of supply must be present and working.
- Introduce the concept of materiality in assessing the impact of the unavailability of a given network element from an incumbent LEC.
- Factors which should be deemed to constitute an impairment of a new market entrant's ability to provide a competitive service:
 - cost differentials: would the unavailability of a given UNE materially increase a competitor's costs -- e.g., would network elements be available from other sources at TELRIC-based rates.
 - economies of scale: would the unavailability of a given UNE deny a competitor the benefit of the incumbent LEC's economies of scope, scale, density or connectivity.
 - time to market delays: would the unavailability of a given UNE result in a material delay in a competitor's provision of service -- e.g., would competitors be required to engage in multiple, prolonged negotiations.
 - increased complexity: would the unavailability of a given UNE increase the difficulties inherent in provisioning, combining or otherwise utilizing that UNE or other UNEs -- e.g., would competitors be required to deal with multiple different interfaces.
 - reduced service quality: would the unavailability of a given UNE materially reduce the quality of the service a competitor could provide.
 - reduced service diversity: would the unavailability of a given UNE materially reduce the variety of services a competitor could offer its customers.

- decreased coverage area.: would the unavailability of a given UNE materially reduce the area a competitor could serve.

UNE DEFINITIONAL CHANGES

- Incorporate xDSL electronics and other equipment into the definition of a loop once an incumbent LEC has deployed xDSL capabilities within its distribution plant.
- Clarify that the local switching element includes data, as well as voice, switching configurations.

TRA'S INTEREST

- Current resale margins are insufficient to support long-term resale strategy; migration over time to unbundled network elements will be required.
- Because of their limited financial resources, smaller providers will be most adversely impacted by the sporadic unavailability from incumbents of individual UNEs.
- Smaller providers will be unable to match what will likely be the incumbents' persistent regulatory initiatives on state level.